FedEx Freight, Inc. *and* International Brotherhood of Teamsters Local No. 107. Case 04–CA–150263

June 30, 2015

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by International Brotherhood of Teamsters Local No. 107 (the Union) on April 16, 2015, the General Counsel issued the complaint on April 29, 2015, alleging that FedEx Freight, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain following the Union's certification in Case 04–RC–134614. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On May 13, 2015, the General Counsel filed a Motion for Summary Judgment. On May 14, 2015, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its position that the petitioned-for unit consists of drivers only but should include both drivers and dockworkers. In addition, the Respondent contends that the Regional Director erred in failing to consider the significant amount of work performed by some drivers as dockworkers at other locations.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.[1] We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Arkansas corporation with a facility in Croydon, Pennsylvania, has been engaged in interstate transportation of freight.

During the past year, the Respondent received more than $50,000 for its interstate transportation operations.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on October 14, 2014, the Union was certified on March 24, 2015, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> Included: All full-time and regular part-time road drivers and city drivers employed by the Employer at its Croydon, Pennsylvania facility;
>
> Excluded: All other employees, dockworkers, mechanics, office clerical employees, guards and supervisors as defined in the Act.

[1] In its response to the Notice to Show Cause, the Respondent urges the Board to consider a "clarification of the evidence presented" in the representation proceeding and deny the General Counsel's Motion for Summary Judgment. The alleged clarification that the Respondent seeks to offer includes a revised report showing the amount of dock work performed by drivers at "non-domiciled" terminals (i.e., locations other than the East Philadelphia Terminal). We find no merit in the Respondent's contention. The Respondent does not contend that the proffered evidence is newly discovered or previously unavailable, nor would such evidence, if adduced, establish special circumstances. Newly discovered evidence is evidence in existence at the time of the hearing that could not be discovered by reasonable diligence. *Manhattan Center Studios, Inc.*, 357 NLRB No. 139 (2011). In addition, in order to warrant a further hearing, the newly discovered evidence must be such that if adduced and credited it would require a different result. See Sec. 102.48(d)(1) of the Board's Rules and Regulations. The proffered evidence concerns facts that were in existence at the time of the representation hearing, and it is offered in support of the same arguments by the Respondent that were fully litigated at the hearing and subsequently rejected. Further, even assuming that the proffered evidence is newly discovered, the Respondent has failed to show that it would require a different result.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated March 27, 2015, the Union requested that the Respondent bargain with it as the exclusive collective-bargaining representative of the unit employees and, since about March 27, 2015, the Respondent has refused to do so.

We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about March 27, 2015, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); accord *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, FedEx Freight, Inc., Croydon, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Teamsters Local No. 107 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Included: All full-time and regular part-time road drivers and city drivers employed by the Employer at its Croydon, Pennsylvania facility;
>
> Excluded: All other employees, dockworkers, mechanics, office clerical employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Croydon, Pennsylvania, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 27, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 30, 2015

Kent Y. Hirozawa, Member

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Teamsters Local No. 107 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

Included: All full-time and regular part-time road drivers and city drivers employed by the Employer at its Croydon, Pennsylvania facility;

Excluded: All other employees, dockworkers, mechanics, office clerical employees, guards and supervisors as defined in the Act.

FEDEX FREIGHT, INC.

The Board's decision can be found at www.nlrb.gov/case/04-CA-150263 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.